In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 702

GEORGE LESLIE SAMUELS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion. The opinion of the court of appeals affirming the judgment of conviction (Pet. App. 15–30) is reported at 398 F. 2d 964.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 1968, and a petition for rehearing was denied on October 2, 1968 (Pet. App. 32). The petition for a writ of certiorari was filed on October 31, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

326-241—68

QUESTIONS PRESENTED

1. Whether in his summation government counsel made an impermissible comment on petitioner's failure to testify.

2. Whether the trial court unduly restricted the cross-examination of a government witness.

STATEMENT

In 1965 petitioner was indicted in the United States District Court for the Western District of Texas for ten violations of Sections 7201 and 7206(1) of the Internal Revenue Code of 1954. Five of the counts charged that he had wilfully attempted to evade his individual income taxes for the specified years; the other five charged that he had wilfully subscribed to false corporate tax returns of the Samuels Glass Company for those years under the penalties of perjury (R. 9–15). After a jury trial petitioner was found guilty on all counts and sentenced to concurrent terms of 18 months on each count (R. 6–7, 56–57). The court of appeals affirmed (Pet. App. A).

Throughout the years in question—1958 through 1962—petitioner was the president of the Samuels Glass Company, a corporation which engaged in the business of selling glass, aluminum and scrap metal in the San Antonio, Texas, area. Annual sales approached $2,000,000. The violations resulted primarily from certain special purchasing arrangements entered into by petitioner and two of the company's customers, Francis Kuemmel and Luther Warrick. When these two customers purchased merchandise from the

company, they dealt with petitioner personally, making their payments directly to him in currency, usually in bills of $100 denomination. Such payments were not recorded in the company's books and records, and were not reported as income by either petitioner or the corporation. A similar pattern of operation was also shown involving lesser amounts in other transactions conducted by petitioner (R. 85–114, 148, 152–155, 166–174, 443–511, 547, 806–822, 928–937, 970–975).

ARGUMENT

1. In his closing argument defense counsel made speculative statements about what *might* have happened between petitioner and the witness Kuemmel (R. 1271–1272, 1286). Thereafter, in his summation, government counsel made this statement (Pet. App. 22–23, n. 2):

> I am proud to talk about the facts * * * I want to speak on the issues raised by the defense in defending this case.
>
> I want to talk about Francis Kuemmel * * *.
>
> Mr. G. L. Samuels chose this man—this awful fellow, this awful fellow—simply because he was a good customer and could come up with the cash when G. L. Samuels wanted it. Mr. Francis Kuemmel was good enough to do business with, he was good enough to pay G. L. Samuels and the Samuels Glass Company about a hundred and ten thousand dollars over a five-year period, but he is such a bad guy now * * * And he was good enough to lend money to at interest. But he is such a bad guy now.
>
> I don't think you are going to like that. If he was good enough then, he is good enough now.

> Except, G. L. Samuels does not want to talk about the facts.
>
> Mr. Foster [defense counsel] says, "Let me tell you what could have happened. Mr. Kuemmel could have put some of this money in his own pocket."

Petitioner asserts that government counsel's statement in the penultimate paragraph—"Except, G. L. Samuels does not want to talk about the facts"—was an impermissible comment on his failure to testify which violated his Fifth Amendment right not to take the stand. However, no objection was made to this statement until the conclusion of the arguments. Unless the statement constituted plain error, an objection made at that time was unavailing, since untimely, for it did not give the prosecutor a chance to withdraw it or explain it. *Fogarty* v. *United States,* 263 F. 2d 201, 204 (C.A. 5); *Birnbaum* v. *United States,* 356 F. 2d 856, 866 (C.A. 8); *Isaacs* v. *United States,* 301 F. 2d 706, 736 (C.A. 8), certiorari denied, 371 U.S. 818. There is no reason why the appellate courts should "treat as plain error that which counsel themselves did not notice sufficiently to call to the court's attention at the time." *Langford* v. *United States,* 178 F. 2d 48, 54 (C.A. 9), certiorari denied, 339 U.S. 938.[1]

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[1] In the *Langford* case the prosecutor twice made a direct comment on the failure of the accused to take the witness stand, but the conviction was affirmed because the defense failed to object.

In *O'Connor* v. *Ohio,* 385 U.S. 92, relied upon by petitioner (Pet. 6, 10–11), this Court held that in the particular circumstances there the failure to object to a comment on the de-

The remaining question is whether the remark complained of was, in the words of the court below in rejecting the contention, "so flagrant as to constitute plain error within the meaning of Rule 52(b), F.R. Cr. P." (Pet. App. 22). In making this determination the facts and circumstances of each case must be carefully analyzed to determine whether the language used was manifestly intended as, or was of such a character that the jury would naturally and necessarily take it to be, a comment on the failure of the accused to testify. *Davis* v. *United States,* 357 F. 2d 438, 441 (C.A. 5), certiorari denied, 385 U.S. 927; *Hayes* v. *United States,* 368 F. 2d 814, 816 (C.A. 9); *United States* v. *Wright,* 309 F. 2d 735, 738 (C.A. 7), certiorari denied, 372 U.S. 929; *United States ex rel. D'Ambrosio* v. *Fay,* 349 F. 2d 957, 961 (C.A. 2), certiorari denied, 382 U.S. 921. Applying this test, the court below found that there was no plain error (Pet. App. 22–24). The challenged statement, when read in context, was quite apparently addressed to the argument made by defense counsel in which he talked about what *could* have happened and disregarded the evidence, *i.e.,* "the facts". It was conceded by government counsel that "the facts" were all in evidence and no demand was made that the accused should produce any additional proof. Nor was any attempt made to draw any in-

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fendant's not taking the stand did not bar his subsequent claim of error. In that case, however, a long-standing state practice existed which permitted such comment and defendant had no way of foreseeing that that practice would be held unconstitutional by this Court in *Griffin* v. *California,* 380 U.S. 609.

ference from petitioner's failure to testify. In short, the remark complained of was directed to the argument of counsel and not to petitioner's failure to take the stand. Any possible misinterpretation was cured by the trial court's instructions, which forbade the jury to "weigh against the defendant in the slightest degree" (R. 1335) the fact that he did not testify, and which told them that no inference of any kind could be drawn against him because of that fact (*ibid*). *United States* v. *Wright,* 309 F. 2d 735, 739 (C.A. 7), certiorari denied, 372 U.S. 929; *Walsh* v. *United States,* 371 F. 2d 135, 136 (C.A. 9); *Knowles* v. *United States,* 224 F. 2d 168, 170 (C.A. 10).

Petitioner relies extensively on *Griffin* v. *California,* 380 U.S. 609, and *Chapman* v. *California,* 386 U.S. 18. But those cases are not controlling or even directly apposite, for in both the converse situation from that presented here existed. In those cases specific comments were made by the prosecutor on the defendants' failure to testify and the jurors were charged that they could draw adverse inferences from such failure. It was in these circumstances that the Court in *Chapman* found such comment to constitute something more than harmless error.

2. Similarly without merit is petitioner's contention (Pet. 11–13) that the trial court erred in restricting the cross-examination of the witness Kuemmel. In the course of the trial it was brought out that realty and a truck owned by Kuemmel were held in

the names of other persons, as a way of impeaching his credibility. These matters were fully developed by defense counsel in the cross-examination of Kuemmel (R. 324–328, 330–331), and were discussed in the closing argument of the defense (R. 1256–1259, 1276). The trial court would not, however, permit proof that Kuemmel allegedly committed the offense of false swearing in connection with these assets in a divorce proceeding. Some mention, however, was made of Kuemmel's divorce (R. 331), and it should have been clear to the jury that the alleged concealment of assets took place in connection with the divorce proceeding.

As petitioner recognizes (Pet. 11), the extent of "cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court." *Alford* v. *United States,* 282 U.S. 687, 694. Moreover, it is improper to cross-examine a witness regarding alleged collateral conduct of an illegal nature for which he has not been prosecuted. *Duke* v. *United States,* 255 F. 2d 721, 728 (C.A. 9), certiorari denied, 357 U.S. 920); *Wegman* v. *United States,* 272 F. 2d 31, 34 (C.A. 8); *Echert* v. *United States,* 188 F. 2d 336, 343 (C.A. 8). Kuemmel was subjected to a vigorous cross-examination which included a reasonable inquiry into his alleged concealment of assets. The court below was justified in concluding that "the trial court did not abuse its discretion in relation to the scope of the inquiry" (Pet. App. 28).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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